NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
WILLIAM O'DELL McLAIN, JR.,	:	BANKRUPTCY CASE
	:	NO. 01-12342-WHD
Debtor.	:	
_____	:	
JERILYN McLAIN,	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 02-1770
v.	:	
GARY W. BROWN, Trustee for the Estate of William O. McLain, Jr.,	:	
Defendant.	:	
_____	:	
GARY W. BROWN, Trustee for the Estate of William O. McLain, Jr.,	:	
Counter-Claimant,	:	
v.	:	
JERILYN McLAIN,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Counter-Defendant	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Summary Judgment filed by Gary W. Brown (hereinafter the "Trustee") in his capacity as the trustee of the bankruptcy estate of

William O. McLain, Jr. (hereinafter the "Debtor"). This motion arises in connection with a counterclaim filed by the Trustee against Jerilyn McLain (hereinafter "McLain") to avoid and recover certain transfers in accordance with §§ 544, 548, 549 and 550 of the Bankruptcy Code. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(H); 1334.

FINDINGS OF FACT

A. General Facts

1. The Debtor and McLain are and have been husband and wife at all times relevant to this proceeding.

2. The Debtor has been the sole owner of numerous businesses since at least 1995. The Debtor was personally liable for many of the debts of his businesses. Trustee's Statement of Undisputed Fact, ¶ 48. These businesses began to suffer losses at some point around 1999-2000. Trustee's Statement of Undisputed Fact, ¶ 49; McLain's Response to Trustee's Statement of Undisputed Fact, ¶ 50.

3. The Debtor's businesses filed for protection under Chapter 11 of the Bankruptcy Code on or about March 2, 2001. Trustee's Statement of Undisputed Fact, ¶ 51.

4. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on September 7, 2001.

B. The Castle Lake Property

1. The Debtor acquired title to real property known as 2135 Castle Lake Drive, Tyrone, Georgia (hereinafter the "Castle Lake Property") for the sum of $29,500 on or about July 31, 1984. At that time, the Castle Lake Property was an unimproved subdivision lot. Trustee's Statement of Undisputed Facts, ¶ 1.

2. At sometime after the purchase of the Castle Lake Property, the Debtor obtained a construction mortgage on the Castle Lake Property, and a residence was constructed on the Castle Lake Property. Trustee's Statement of Undisputed Facts, ¶ 2; McLain's Response to Trustee's Statement of Undisputed Facts, ¶ 2.

3. All mortgages given on the Castle Lake Property prior to 1985 were satisfied no later than December 19, 1985. Trustee's Statement of Undisputed Facts, ¶¶ 2-4.

4. The Debtor conveyed a one-half interest in the Castle Lake Property to McLain, on or about February 12, 1987 in consideration of "love and affection." Trustee's Statement of Undisputed Facts, ¶ 5.

5. In February 1987, the Debtor and McLain granted a security interest in the Castle Lake Property in favor of Citizens and Southern Commercial Corporation to secure a loan in the amount of $110,200. This mortgage was satisfied and canceled on June 15, 1998. Trustee's Statement of Undisputed Facts, ¶ 6.

6. On February 3, 1995, McLain reconveyed her one-half interest in the Castle Lake Property to the Debtor for no valuable consideration, and no transfer tax was paid.

Trustee's Statement of Undisputed Facts, ¶ 7.

7. Also on February 3, 1995, the Debtor conveyed a second mortgage against the Castle Lake Property in favor of Citizens Bank and Trust of Fayette County to secure the guaranty of a debt owed by Castle Lake Development, Inc. and McLain's Building Materials of Morrow, Inc. in the amount of $399,000 and a third mortgage in favor of Citizens Bank and Trust of Fayette County to secure a debt of $80,000. The second and third mortgages were satisfied on July 31, 1995. Trustee's Statement of Undisputed Facts, ¶ 8.

8. On or about May 30, 1996, the Debtor conveyed the Castle Lake Property to himself and McLain as joint tenants with rights of survivorship. No valuable consideration was paid by McLain for the transfer, and no transfer tax was paid. Trustee's Statement of Undisputed Facts, ¶ 10; McLain's Response to Trustee's Statement of Undisputed Fact, ¶ 10.

9. On May 30, 1996, the Debtor and McLain granted a security interest in the Castle Lake Property to Newnan Savings Bank. The Newnan Savings Bank mortgage was satisfied and canceled on August 20, 1998. Trustee's Statement of Undisputed Facts, ¶¶ 11.

10. On or before December 31, 1997 the Debtor conveyed his one-half interest in the Castle Lake Property to McLain for no valuable consideration, and no transfer tax was paid. Trustee's Statement of Undisputed Facts, ¶ 12.

11. On or about November 22, 2000, the Debtor and McLain granted a security interest in the Castle Lake Property to Branch, Banking, and Trust to secure a $100,000 line of credit. The Debtor did not have a record title interest in the Castle Lake Property at that time, but did execute an affidavit stating that he had an ownership interest in the Castle Lake Property. Trustee's Statement of Undisputed Facts, ¶ 13.

12. Following the conveyance of his interest in the Castle Lake Property to McLain, the Castle Lake Property was listed as an asset of the Debtor on financial statements submitted by the Debtor to lenders. Trustee's Statement of Undisputed Facts, ¶ 14; McLain's Response to Trustee's Statement of Undisputed Fact, ¶ 14.

13. After the conveyance of his interest in the Castle Lake Property to McLain, the Debtor continued to pay at least some of the homeowners' insurance premiums for the Castle Lake Property from his own funds and listed himself as an insured party on the insurance policies. Trustee's Statement of Undisputed Facts, ¶ 15; McLain's Response to Trustee's Statement of Undisputed Facts, ¶ 15.

14. After conveying his interest in the Castle Lake Property to McLain, the Debtor made the majority of the mortgage payments for the Castle Lake Property. Trustee's Statement of Undisputed Facts, ¶ 17.

15. The Debtor listed the Castle Lake Property as his residence on his bankruptcy petition. 16. After the filing of the Debtor's bankruptcy petition, McLain allowed the Debtor to use the Castle Lake Property as collateral to secure a loan of $200,000 for use

in his business, Palmetto Door and Window Company. Trustee's Statement of Undisputed Facts, ¶ 19.

C. *The St. Simon's Property*

1. The Debtor acquired sole fee simple title to real property known as Lot 10, Block F, Hampton Point, Glynn County, Georgia (hereinafter the "St. Simon's Property") on or about August 2, 1995 and immediately conveyed the St. Simon's Property to McLain for no valuable consideration. Trustee's Statement of Undisputed Fact, ¶ 20.

2. The Debtor used funds withdrawn from a money market account jointly held in the names of the Debtor and McLain to purchase the St. Simon's Property. Trustee's Statement of Undisputed Fact, ¶ 22.

3. The closing of the purchase of the St. Simon's Property was transacted through the mail, with the Debtor executing the necessary documents in Fayette County. Trustee's Statement of Undisputed Fact, ¶ 24.

4. McLain sold the St. Simon's Property on or about October 31, 2002 for $150,000. The Debtor received $8,000 from the sale proceeds, and the remainder was deposited into an account held by McLain at the Bank of Georgia. Trustee's Statement of Undisputed Fact, ¶ 25.

5. The Debtor has included the St. Simon's Property as an asset on various financial statements that he has submitted to lenders. Trustee's Statement of Undisputed Fact, ¶ 26.

6. The Debtor has paid at least some of the property taxes and homeowner association dues on the St. Simon's Property from his personal funds. Trustee's Statement of

Undisputed Fact, ¶ 27; McLain's Response to Trustee's Statement of Undisputed Facts, ¶ 27.

D. *Deposit Accounts*

1. McLain had a personal savings account with Peachtree National Bank (hereinafter the "McLain Account"), which was closed at some time prior to January 19, 1995. Trustee's Statement of Undisputed Fact, ¶ 29.

2. McLain's payroll checks from her employment as a school teacher were deposited into McLain's personal checking account. Trustee's Statement of Undisputed Fact, ¶ 31.

3. The Debtor and McLain opened a joint money market account with Peachtree National Bank on May 11, 1993 (hereinafter the "Money Market Account"). Trustee's Statement of Undisputed Fact, ¶ 28.

4. From 1995 through early 2001, large deposits were made into the Money Market Account. Trustee's Statement of Undisputed Fact, ¶ 32.

5. The majority of the funds withdrawn from the Money Market Account were used by the Debtor. Trustee's Statement of Undisputed Fact, ¶ 32.

6. On or about January 16, 2001, McLain transferred all of the funds in the Money Market Account, $36,079.59, into her personal deposit account at Peachtree National Bank. Trustee's Statement of Undisputed Fact, ¶ 34.

7. The Debtor held a deposit account at Peachtree National Bank (hereinafter the

"Debtor's Deposit Account"). On the date the Debtor filed his bankruptcy petition, the Debtor's Deposit Account held $16,744.29. On or about November 11, 2001, the Debtor transferred $10,000 from the Debtor's Deposit Account to McLain. Trustee's Statement of Undisputed Fact, ¶ 36.

8. On or about November 10, 2001, McLain deposited $10,000 into a certificate of deposit at Peachtree National Bank (hereinafter the "Certificate of Deposit"). Trustee's Statement of Undisputed Fact, ¶ 37.

9. On July 11, 2002, McLain transferred $10,118.39 from the Certificate of Deposit to a certificate of deposit at Southern Community Bank, along with $25,000 of additional funds owned by the Debtor. Trustee's Statement of Undisputed Fact, ¶ 38.

10. The Trustee demanded the turnover of all of the funds deposited into the Southern Community Bank certificate of deposit. McLain has turned over $25,289.97. Trustee's Statement of Undisputed Fact, ¶ 39; McLain's Response to Trustee's Statement of Undisputed Fact, ¶ 39.

E. *The Life Insurance Policy*

1. The Debtor owned a life insurance policy issued by the Equitable (hereinafter the "Life Insurance Policy"). The Debtor's son, William O. McLain, III was the named insured. Trustee's Statement of Undisputed Fact, ¶ 40.

2. The Debtor took several loans against the Life Insurance Policy, including a loan of

$36,000 requested on February 27, 1995 and a loan for $20,000 requested on December 19, 2000. Trustee's Statement of Undisputed Fact, ¶ 41.

3. Between 1995 and October 2000, the value of the Life Insurance Policy increased by $113,000. Trustee's Statement of Undisputed Fact, ¶ 41.

4. On October 12, 2001, the Debtor requested a loan against the Life Insurance Policy in the amount of $50,000, and the funds were disbursed on October 16, 2001. Trustee's Statement of Undisputed Fact, ¶ 43.

5. On December 18, 2001, the Debtor requested a loan against the Life Insurance Policy in the amount of $6,000, and the funds were disbursed on December 21, 2001. Trustee's Statement of Undisputed Fact, ¶ 44.

6. On September 16, 2002, the Debtor requested surrender of the Life Insurance Policy, and the proceeds of the surrender, in the amount of $27,551.48, were disbursed on September 19, 2002. Trustee's Statement of Undisputed Fact, ¶ 45.

7. On or about October 19, 2001, the Debtor deposited $50,000 loan proceeds into a certificate of deposit held jointly with McLain at Southern Community Bank (hereinafter the "SCB CD"). The certificate of deposit was used as collateral to secure a line of credit issued by Southern Community Bank in favor of Georgia Flush Door Sales, a supplier of the Debtor's business, Palmetto Door and Window Company. Trustee's Statement of Undisputed Fact, ¶ 46.

8. The SCB CD was redeemed, and, on June 26, 2002, the $50,000 was paid to Georgia

Flush Door Sales. The balance of $751.19 was deposited in a second certificate of deposit. Trustee's Statement of Undisputed Fact, ¶ 47.

CONCLUSIONS OF LAW

A. The Summary Judgment Standard.

The Trustee seeks summary judgment as to Counts II, III, V, VI, VII, VIII, and IX of the Complaint. In accordance with Federal Rule of Bankruptcy Procedure 7056, which incorporates Federal Rule of Civil Procedure 56, this Court will grant a motion for summary judgment only in the absence of any material issue of fact so as to make the movant entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The movant has the burden of establishing that no such factual issue exists. *Id.* at 324. The Court will read the opposing party's pleadings liberally. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). As a drastic remedy, summary judgment only will be granted when there is no room for controversy. *United States v. Earhart (In re Earhart*), 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986); *Sell v. Heath (In re Heath*), 60 B.R. 338, 339 (Bankr. D. Colo.1986). Finally, the Court will examine the record to determine whether the movant's motion and supporting pleadings provide a sufficient legal basis that would entitle the movant to judgment. *Dunlap v. Transamerica Occidental Life Ins. Co.,* 858 F.2d 629, 632 (11th Cir.1988). If the movant has set forth a

sufficient legal basis, judgment is proper. *Id.*

B. Pre-Petition Transfers

The Trustee challenges the transfers of the Debtor's interest in two pieces of real property, the Castle Lake Property and the St. Simon's Property, to McLain that occurred several years prior to the filing of the Debtor's bankruptcy petition and the transfer of $36,079.59 made to McLain within one year prior to the filing. The Trustee asserts that the Debtor's interest in the two pieces of real property should be recovered for the benefit of the Debtor's creditors under either of two theories. Counts I and IV allege that the transfers of the Debtor's interest in the Castle Lake Property and the St. Simon's Property are avoidable under § 544(b) and O.C.G.A. § 18-2-22. However, the Trustee has not sought summary judgment as to these counts. Alternatively, the Trustee has alleged that the Debtor has retained a beneficial ownership interest in these pieces of property that can be reached for the benefit of creditors. First, the Trustee asserts that, through his "strong arm powers," he can either attach the property as an equitable asset, pursuant to Section 23-3-96 of the Official Code of Georgia, or seek the imposition of a constructive trust for the benefit of the Debtor's creditors. Second, the Trustee asserts that the Debtor's equitable interest in these properties became property of the Debtor's bankruptcy estate and is now subject to turn over pursuant to § 542 of the Bankruptcy Code. The transfers at issue include the following: 1) the transfer of a one-half interest

in the Castle Lake Property in 1995; 2) the transfer of the second one-half interest in the Castle Lake Property in 1997; and 3) the transfer of the St. Simon's Property in 1995. The Trustee also contends that the Debtor transferred $36,079.59 to McLain on or about January 16, 2001 and that this transfer is avoidable and recoverable under § 548 and § 550.

1. The Castle Lake Property and the St. Simon's Property

The equitable theories asserted by the Trustee are somewhat novel. With regard to these theories, there is little case law from which to distill the necessary elements that must be proven by the Trustee under these particular facts. For example, the Court can locate no authority in which creditors have used Section 23-2-96 to attach assets under the present factual circumstances. It appears that the majority of the cases arising under Section 23-2-96 involve the sale of a debtor's equity in real property when legal title has been conveyed to a lender under a deed to secure debt, or to recover the debtor's beneficial interest in a trust. *See Cook v. Securities Inv. Co.*, 192 S.E. 179 (Ga. 1937); *Henderson v. Collins*, 267 S.E.2d 202 (Ga. 1980). Although the statute may be applicable to the alleged facts in broad terms, the Court is reluctant to press this statute into service for the purpose of recovering a debtor's secret interest in real property if the Trustee may have other more well-worn theories under which to travel. The Court would prefer to defer any ruling on whether these alternative remedies are available until

it has concluded that the Trustee cannot prove sufficient facts to establish that the transfers are avoidable under § 544(b) and O.C.G.A. 18-2-22. Although McLain has argued that, as a matter of law, this remedy is not available to the Trustee, McLain's argument has been rejected by the Eleventh Circuit Court of Appeals. *See Chepstow, Ltd. v. Hunt*, 2004 WL 1852808, *2 (11th Cir. Aug. 19, 2004) (holding that "as a matter of Georgia law . . . the UFTA did not retroactively repeal Ga. Code Ann. §§ 18-2-22, nor otherwise affect any claims based upon that statutory provision, where the underlying events occurred before the July 1, 2002 effective date of the UFTA"). Accordingly, the Trustee's claim under Section 18-2-22 remains viable, and the Court believes, should be exhausted prior to the Trustee's pursuit of his alternative equitable theories. The Court will reserve ruling on these alternative theories until after the Trustee has either filed a renewed motion for summary judgment as to his fraudulent conveyance claim or has submitted evidence at trial as to all theories. If the Trustee chooses to file a second motion for summary judgment, and the Court determines that summary judgment is not warranted as to the fraudulent conveyance claim, the Court will reconsider the alternative theories at that time.

2. The Transfer of $36,079.59

The Trustee also seeks the avoidance of a pre-petition transfer of funds from a money market account, which was held jointly by the Debtor and McLain, to a deposit

account, which was held solely in McLain's name. The Trustee contends that, because this transfer was made within one year prior to the filing of the Debtor's bankruptcy petition, it is avoidable under § 548 of the Bankruptcy Code. Section 548 provides that:

> **(a)(1)** The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> **(A)** made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . , indebted; or
>
> **(B)(I)** received less than a reasonably equivalent value in exchange for such transfer . . . ; and
>
> **(ii)(I)** was insolvent on the date that such transfer was made . . . , or became insolvent as a result of such transfer . . . ;
>
> **(II)** was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> **(III)** intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1). As in the case of § 544(b), a trustee may avail himself of more than one theory to succeed under § 548. First, the trustee may show that, within one year prior to filing his petition, the debtor transferred an interest in property with the intent to hinder, delay, or defraud his creditors. Second, the trustee may show that, within one year prior to filing his petition, the debtor transferred an interest in property in exchange for less than the reasonably equivalent value of the property while insolvent, or that the transfer of the property rendered the debtor insolvent.

Here, the Debtor filed his voluntary bankruptcy petition on September 7, 2001.

The undisputed facts show that the Debtor and McLain held a joint money market account at Peachtree National Bank (hereinafter the "Money Market Account"). Additionally, McLain has admitted that on or about January 16, 2001, she transferred all of the funds held in the Money Market Account, the balance of which was $36,079.59, into her personal deposit account at Peachtree National Bank. It is also undisputed that the Debtor had no legal interest in McLain's deposit account. Accordingly, the Trustee has established that the Debtor's interest in the funds in the Money Market Account was transferred to McLain within the one year prior to the filing of the Debtor's bankruptcy petition. That being said, the parties' first disagreement is over the extent of the Debtor's interest in those funds. The Trustee contends that the Debtor had a 100% interest in the entire balance of the account because the Debtor deposited the majority of the funds into the Money Market Account, and McLain disputes this fact.

"In the absence of a specific bankruptcy provision to the contrary, a determination by the bankruptcy court concerning property rights of a debtor . . . is generally a matter of state law." *In re Fashion Accessories, Ltd*., 308 B.R. 592, 594-95 (Bankr. N.D. Ga. 2004) (Murphy, J.) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)); *see also In re Witko*, 374 F.3d 1040 (11th Cir. 2004). Here, "as no Bankruptcy Code provision compels a departure from [the Debtor's] rights outside of bankruptcy, the prevailing Georgia law applies." *Fashion Accessories, Ltd.,* 308 B.R. at 595. Under Georgia law, "a joint account belongs, during the lifetime of all parties, to the parties in proportion to

the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." O.C.G.A. 7-1-812(a). Section 7-1-812(a) creates a statutory presumption that funds held in a joint account are owned in proportion to the contributions made by the joint account holders and that the party funding the account does not intend to make a gift of the funds deposited into the account to the joint account holder. *See In re Sandlin*, 2002 WL 934564 (Bankr. M.D. Ga. Feb. 19, 2002); *see also Parker v. Kennon,* 530 S.E.2d 527, 530 (Ga. App. 2000). This presumption can be rebutted by clear and convincing evidence of a contrary intent between the account holders. *Id*. The fact that the joint account holder has the authority to withdraw the funds from the joint account is irrelevant to the determination of ownership. *See Parker v. Kennon*, 530 S.E.2d at 530.

Having reviewed the record, the Court concludes that a question of fact remains as to the ownership of the funds that were held in the Money Market Account. In his statement of undisputed facts, the Trustee has suggested that the funds in the Money Market Account arrived by way of several large deposits. Trustee's Statement of Undisputed Facts, ¶ 32. McLain has admitted this to be true. However, the Trustee has not identified the source of those deposits other than to reference the Court to Exhibit CC. Exhibit CC appears to be statements and other records relating to the Money Market Account. The Court cannot consider these statements because they are not accompanied by an affidavit establishing their authenticity and, accordingly have not

properly entered the record. *See* FED. R. CIV. P. 56(e); *see also In re Harris,* 209 B.R. 990 (Bankr. 10th Cir. 1997) (although Rule 903 of the Federal Rules of Evidence obviates the need for the testimony of a subscribing witness to authenticate a writing, Rule 903 does not completely obviate the need for the authentication of the document); *In re Walton*, 158 B.R. 948, 951 (Bankr. N.D. Ohio 1993) ("'[D]ocuments ... [that] are not part of the pleadings, depositions, answers to interrogatories, and admissions on file, can only enter the record as attachments to an appropriate affidavit to constitute a basis for summary judgment'".).

The Trustee also relies upon the undisputed fact that the Debtor has used the majority of the funds withdrawn from the Money Market Account. Trustee's Statement of Undisputed Fact, ¶ 32. As McLain has pointed out, the ability to withdraw funds from a joint deposit account is not relevant to the issue of ownership of the funds. The Court agrees that the fact that the Debtor withdrew and used funds from the Money Market Account is some evidence that the funds used were originally deposited by the Debtor. However, this fact does not necessarily provide evidence that the funds still remaining in the account were also deposited by the Debtor.

Finally, the Trustee relies upon the fact that McLain's main source of income has been her salary from her job as a school counselor, which she always deposited into her personal checking account. Trustee's Statement of Material Fact, ¶ 31. From this, the

Court is asked to infer that McLain could not have otherwise amassed $36,000 to deposit in the Money Market Account and, accordingly, the $36,000 must have been earned and deposited by the Debtor. McLain controverted this statement of fact by stating that she has received rental income over the years and gifts or household expense allowances from her husband. In support, McLain points to her affidavit. Affidavit of Jerilyn McLain, at 6. The Trustee argues that McLain cannot merely rely upon her own affidavit to substantiate her position that a question of material fact remains as to the source of these funds. However, the Trustee relies entirely upon his contention that this fact is undisputed and has not pointed to any evidence in support of his allegation that McLain has not received additional income from sources other than her employment.[1] Accordingly, the Court can conclude that this fact remains in dispute and the parties will be free to present evidence at trial as to the source of the funds in the account.

That being said, the Court agrees with the Trustee's assertion, assuming the Debtor had an ownership interest in even a portion of the funds in the Money Market Account, there is no question that the Debtor transferred the funds with the intent to hinder, delay, or defraud his creditors. "Because proof of 'actual intent to hinder, delay, or defraud' creditors, pursuant to 11 U.S.C. § 548, may rarely be accomplished by direct

[1] The Trustee has referenced Exhibit BB, which appear to be the tax records of the Debtor and McLain. Again, the Court cannot consider these documents, as they are not accompanied by an affidavit establishing their authenticity and have not properly entered the record.

proof," bankruptcy courts must consider the circumstantial evidence and "look to the existence of certain badges of fraud." *In re XYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998). These factors include: "(i) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question by the debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question; (v) the conveyance of all of the debtor's property; (vi) the secrecy of the conveyance; (vii) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring debt, onset of financial difficulties, or pendency or threat of suit by creditors; and (viii) the general chronology of the events and transactions under inquiry." *In re Matus*, 303 B.R. 660, 672-73 (Bankr. N.D. Ga. 2004) (Mullins, J.).

In this case, the undisputed facts provide both direct and circumstantial evidence of the Debtor's intent to hinder, delay, or defraud his creditors by transferring the funds in the Money Market Account. In his statement of undisputed facts, the Trustee contends that the Debtor testified that the funds were transferred because liens had been placed on the Debtor's other accounts and he gave the funds to McLain for "safekeeping." Trustee's Statement of Undisputed Facts, ¶ 35. McLain has not controverted this statement, and it is supported by the Debtor's deposition testimony. *See* Transcript of William O. McLain, Jr., January 20, 2003, at 71 ("I just had her take

my name off of it because that guy had liened my checking account."). Additionally, the Debtor testified that the creditors of his businesses had recently swept his other bank accounts and "[t]here was no way [he] was going to borrow money and put it into one of those bank accounts where they could sweep it." *Id*. at 73. Finally, the Debtor stated that he "might have given money to [McLain] to put into her account for safekeeping until [he] needed to write it into the business." *Id*.

Under these circumstances, the Court can see no other reading of the Debtor's testimony. His testimony clearly supports a finding that he was trying to keep the funds in the Money Market Account out of the reach of his creditors. McLain has offered no other explanation for the transfer and has pointed to no evidence that would suggest that the Debtor's motivation in transferring the funds was not to keep the money from his creditors. *See id*. at 72 (when asked why his wife would have moved the $36,000 from the Money Market Account to her personal account, the Debtor answered "I can't answer that. I don't know." and "I'm sure there is a reasonable explanation for it. I can't think of it right this minute.").

Finally, other facts of the case support the drawing of an inference that the transfer of the funds was fraudulent. For example, the transfer of the funds was made to the Debtor's wife, a close family member, in exchange for no valuable consideration. The transfer was made on January 16, 2001, and the Debtor testified that he contacted his attorney about filing his personal bankruptcy proceeding in February 2001, which

indicates that the Debtor was experiencing financial difficulty at the time of the transfer. *See id.* at 84. The Debtor also testified that his financial condition "took a turn for the worse" around the time that his businesses filed bankruptcy, which was in March 2001. *See* Transcript of Deposition of William O. McLain, Jr., March 31, 2004, at 124. Additionally, the record of the Debtor's bankruptcy case indicates that the Debtor failed to disclose the transfer on his Statement of Financial Affairs. The Debtor answered "None" to Question Number 7, which asks for the disclosure of any gifts over $200 per family member within one year before the filing of the petition, and "None" to Question Number 10, which pertains to any other transfer of property within one year prior to the petition. *See* Statement of Financial Affairs of William O. McLain, Jr., Docket Number 4, Case No. 01-12342-WHD. Finally, the Debtor's testimony supports a finding that the Debtor intended to retain a beneficial interest in these funds and later use them to fund the operation of his new business. Therefore, the Court finds that no question of fact remains as to whether the transfer was made with fraudulent intent. Accordingly, at trial the Trustee will need only establish the extent of the Debtor's ownership interest in the funds transferred.

C. *Post-Petition Transfers*

The Trustee has also identified two transfers of property from the Debtor to McLain that occurred after the filing of the Debtor's bankruptcy petition. The Trustee

asserts that these transfers were not authorized and should therefore be avoided and the property recovered for the benefit of the Debtor's bankruptcy estate pursuant to § 549 and § 550. These transfers include: 1) the transfer of $10,000 approximately two months after the Debtor filed his bankruptcy petition; and 2) the transfer of loan proceeds from the Life Insurance Policy.

Section 549 of the Bankruptcy Code provides that "the trustee may avoid a transfer of property of the estate – . . . that occurs after the commencement of the case; and . . . that is not authorized under" the Code or by the Court. 11 U.S.C. § 549. "Commencement of the case" occurs upon the filing of a voluntary petition. *See* 11 U.S.C. § 301. "Property of the estate" includes, with some exceptions not relevant in this case, "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The party "asserting the validity of a transfer under § 549 of the Code shall have the burden of proof." FEDERAL RULE OF BANKR. P. 6001.

The undisputed facts show that the Debtor held solely in his name a deposit account at Peachtree National Bank, which held a balance of $16,744.29 on the date of the Debtor's petition, September 7, 2001. The Court finds that, under § 541(a)(1), these funds became property of the Debtor's bankruptcy estate at that time. The undisputed facts also establish that, on or about November 11, 2001, the Debtor transferred $10,000 from this account to McLain and that McLain invested these funds in a certificate of

deposit. *See* Transcript of Deposition of Jerilyn McLain, January 20, 2003 at 84 (stating that the $10,000 transferred by the Debtor to McLain on November 11, 2001 was the Debtor's money).

In her response to the Trustee's Motion for Summary Judgment, McLain argues that the Trustee has failed to present any evidence to support a finding that the Debtor transferred estate property to McLain after the filing of his petition. However, the Trustee is entitled to rely solely on his Statement of Undisputed Facts, which McLain has admitted, to establish that the property transferred was property of the bankruptcy estate. Further, McLain's own deposition testimony supports this conclusion. McLain also argues that the Trustee has failed to show that no questions of material fact remain as to these elements. Rather than pointing to any evidence that would dispute the Trustee's established facts, McLain simply states that "[f]acts regarding such transactions will be introduced as evidence at trial." This is insufficient to convince the Court that issues of material fact remain as to the transfer of the $10,000. The Trustee has pointed to undisputed facts to support the conclusion that the Debtor transferred $10,000 to McLain after the commencement of the Debtor's bankruptcy case, that the funds transferred were property of the Debtor's bankruptcy estate, which the Debtor had neither scheduled nor exempted, and that the transfer was not authorized by the Court or the Code. The Trustee has therefore established the necessary elements to prevail on his claim and has established that no material facts remain in dispute. McLain had the burden of

producing evidence to counter the Trustee's position. It is insufficient to simply point to the existence of evidence that could, if presented to the Court, demonstrate that a question of fact remains. Accordingly, the Court finds that no material question of fact remains as to the elements necessary for the Trustee to prevail on his § 549 claim as to the $10,000 and, as a matter of law, the Trustee is entitled to recover the transfer pursuant to § 550.

The Trustee also asserts that, after the commencement of his bankruptcy case, the Debtor transferred to McLain certain funds received on account of his ownership of a life insurance policy. The parties agree that the Debtor was the record owner of a life insurance policy written by the Equitable, and that the Debtor's son, William O. McLain, III, was the named insured. However, the parties do not agree as to whether the son held a beneficial interest in the policy on the date the Debtor filed his bankruptcy petition. This is relevant because it is undisputed that the Debtor received the proceeds from several loans taken against the policy after filing his petition. Additionally, the policy was surrendered in September 2002, at which time the Debtor received $27,551.48. If the Debtor owned the policy at the time he filed his petition, the loan proceeds, as well as the funds received upon the surrender of the policy, would have become property of the Debtor's bankruptcy estate pursuant to § 541(a)(6). *See* 11 U.S.C. § 541(a)(6) (property of the estate includes proceeds or profits from property of the estate).

McLain does not dispute the fact that the Debtor purchased the life insurance

policy as a means of saving money to pay for their son's college education. This fact is supported by the testimony of both the Debtor and McLain. *See* Transcript of Deposition of William O. McLain, Jr., March 31, 2004, at 84; Transcript of Deposition of Jerilyn McLain, March 31, 2004, at 22. All of the undisputed facts establish that the Debtor provided the funds to purchase the policy and that he held legal title to the insurance policy when he filed his bankruptcy petition. Additionally, the undisputed facts have established that the Debtor maintained control over the insurance policy at all times prior to the filing of his petition and actually exercised this control by borrowing funds against the policy and surrendering the policy. The undisputed facts have also established that the Debtor used $50,000 of the loan proceeds for his own purposes, rather than providing the funds to his son or paying college tuition with the money. These actions are all consistent with the finding that the Debtor owned the policy, and McLain points to no evidence to suggest that a transfer of ownership to her son occurred. McLain states in her response to the Trustee's Statement of Undisputed Facts that "the Debtor's ownership of such policy is in question" and that the "Plaintiff and Debtor believed such policy was the sole property of their son, William O. McLain, III." While the Debtor's belief that the insurance policy belonged to his son is supported by his deposition testimony, the fact that the Debtor believed that the policy belonged to his son has little bearing on the question of who actually owned the policy. This unsupported allegation that the Debtor and McLain intended the insurance policy to be the property of their son

is insufficient to create a question of fact as to whether the Debtor owned the policy. Accordingly, the Court must find that the Trustee has established that the insurance policy and any loan proceeds resulting therefrom became property of the Debtor's bankruptcy estate.

McLain does not dispute that the Debtor obtained the following proceeds as loans against the insurance policy: 1) $50,000 on October 16, 2001; and 2) $6,000 on December 21, 2001. Additionally, McLain does not dispute that the Debtor requested the surrender of the policy on September 16, 2002 and obtained a disbursement of $27,551.48 on September 19, 2002. Further, McLain does not dispute the fact that: 1) the Debtor deposited the $50,000 he received on October 16, 2001 into a joint certificate of deposit held in the name of the Debtor and McLain; 2) the certificate of deposit was later redeemed and $50,000 was paid to Georgia Flush Door Sales in June 2002; and 3) the balance of $751.19 was deposited into a new joint certificate of deposit held by the Debtor and McLain.

The Court cannot determine from the Trustee's Statement of Undisputed Facts or the deposition transcripts what exactly became of the $6,000 disbursed on December 21, 2001[2] or the $27,551.48 disbursed on September 19, 2002. Accordingly, the Court cannot determine at this time whether the Debtor transferred these funds to McLain. As

[2] The Debtor testified during his deposition that the funds were probably used to pay his son's college tuition. *See* Transcript of Deposition of William O. McLain, Jr., March 31, 2004 at 44.

to the transfer of the $50,000, the Court must conclude that there remains a question of fact as to whether the Debtor transferred any ownership interest in the $50,000 to McLain. The Trustee alleges that the Debtor transferred the $50,000, which he had previously held as equity in the Life Insurance Policy, to a certificate of deposit, which was titled in both the Debtor's name and McLain's name. *See* Amended Complaint, Count IX; Trustee's Statement of Undisputed Facts, ¶ 46.

Without evidence of any intent to make a gift of the funds to McLain, the funds in the joint certificate of deposit would have continued to have been owned exclusively by the Debtor. *See Parker v. Kennon,* 530 S.E.2d 527, 529 (Ga. App. 2000) (holding that, in accordance with O.C.G.A. § 7-1-812(a), the ownership of funds in a joint certificate of deposit is determined "'in proportion to the net contributions by each to the sums on deposit'" unless there is clear and convincing evidence to the contrary). The Court has seen no evidence to suggest that the Debtor intended to make a gift of the $50,000 to McLain. To the contrary, the Trustee has suggested that the certificate of deposit was posted as collateral to secure a line of credit for the Debtor's new business and that, eventually, the funds were released to the supplier. These facts do not suggest that the Debtor intended to grant McLain an interest in the funds. Accordingly, at this point, the Court cannot conclude that the Debtor made a transfer of an interest in property of the estate at the time the funds were placed into the certificate of deposit. While it may be true that the funds were eventually transferred outside of the Debtor's

bankruptcy estate, there is no indication that the funds were transferred to McLain.[3] Without evidence of the Debtor's intent to give the funds to McLain, the Court could not conclude that McLain was a transferee of the funds for purposes of § 550. *See* 11 U.S.C. § 550(a) ("[T]he trustee may recover . . . property transferred . . . from . . . the initial transferee . . . or any immediate or mediate transferee of such initial transferee"). Therefore, the Court cannot grant summary judgment as to the avoidance and recovery of the post-petition transfers of the loan proceeds.

CONCLUSION

Having carefully considered the Trustee's motion and brief, the Court concludes that the Trustee has established that summary judgment in favor of the Trustee is appropriate as to the avoidance and recovery, pursuant to §§ 549 and 550, of the $10,000 transferred from the Debtor's personal account to McLain on November 11, 2001. Accordingly, the Trustee's Motion for Summary Judgment as to this transfer is **GRANTED**. The Court will enter a separate judgment in favor of the Trustee in the amount of $10,000, plus any interest that may have accumulated on these funds since the

[3] Although it has not properly entered the record, the exhibit attached to the Trustee's Statement of Undisputed Facts suggests that the $751.19 balance remaining in the certificate of deposit, after the $50,000 was paid to the supplier, was also deposited into a joint certificate of deposit held in the name of both the Debtor and McLain. Accordingly, it may be that even the $751.19 balance was never effectively transferred to McLain. *See* Trustee's Statement of Undisputed Facts, Exhibit PP.

time of the transfer. Pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure and Rule 54 of the Federal Rules of Civil Procedure, the Court finds no just reason for delay, and that the judgment shall be a final, appealable judgment.

As to the remainder of the Trustee's claims, summary judgment is **DENIED** for reasons discussed above.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of September, 2004.

_____
W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE